ORIGINAL

83-5940

No. A-348

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD KING,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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Mar. 23 P. 6

QUESTIONS PRESENTED

1. Certiorari should be granted because the Federal Questions that were raised and ruled upon were disposed of in a manner that conflicts with the decisions of this Court.

2. Certiorari should be granted to review federal questions which were not raised during trial where the proper resolution is beyond any doubt or where injustice might otherwise result.

3. The Florida Supreme Court Decision is not based on adequate foundations of State Law.

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Petitioner, RICHARD KING, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida in this case.

Respondent in his Brief for Respondent In Opposition states that this petition for certiorari is a "simple renewal" of the grounds argued in the Supreme Court of Florida. A violation of one's constitutional rights is never a simple issue.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FEDERAL QUESTIONS THAT WERE RAISED AND RULED UPON WERE DISPOSED OF IN A MANNER THAT CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Florida Supreme Court's holding should be reviewed as their decision rests on a serious misapprehension of federal constitutional law. The holding in the instant case is clearly at odds with the principles set forth in Miranda and its progeny. The trial court admitted into evidence over Petitioner's timely objections, incriminating statements received by the police after the Petitioner requested an attorney. The record clearly reveals that the petitioner requested an attorney repeatedly, but the questioning continued on under a different guise after each request for an attorney was made. The police officers pursued their investigation and further developed their case against the petitioner by sloughing over his requests for

an attorney by using such ploys as "we're only here to talk to you about what the Detective from Daytona Beach talked to you about" (r. 763) or making a tape for a permanent record (R. 1356).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), this Court made it clear when the mandate was made:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." Id., at 473-474 (emphasis supplied) (footnote omitted).

The Court in Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed. 2d 197 (1979), observed that Miranda created a "per se" rule that upon a request for counsel, interrogation must cease until counsel is provided. Id., at 717-719.

Again in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980), the Court referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation "until he had consulted with a lawyer" once a suspect in custody had invoked his Miranda right to counsel. The Court reconfirmed the views of Miranda and, "to lend them substance, emphasize[d] that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981).

The Petitioner relies on Miranda and its progeny and their rigid rule that once a suspect in custody invokes his Miranda right to counsel, the suspect is to be free of interrogation until he has consulted with a lawyer. The record of Petitioner is very clear. Petitioner requested an attorney repeatedly, but such requests were sloughed off by police officers, and the interrogation continued. The Petitioner sought to suppress statements made by him after his invocation of his Miranda rights. The trial court denied Petitioner's Motion to Supress Confessions and Admissions. Incriminating statements made after the invocation of his Miranda rights

were admitted into evidence (R. 766-787) over Petitioner's timely objection (R. 765,770, 787).

Petitioner's case can be distinguished from that of Solem v. Stumes, ___ U.S. ___ (1984). In Solem, the Court stated that the rule established in Edwards, that once a suspect has invoked his right to counsel, further interrogation in counsel's absence is forbidden unless the suspect initiates the conversation with the police, should not be applied retroactively on collateral review of final conviction. In the instant case, at the end of the first interview, Petitioner stated that he did not want to talk about it anymore and the interview was concluded. (R. 729) At the beginning of the second interview after the Petitioner was advised of his Miranda rights and Petitioner exercised his Miranda rights by stating his need for an attorney, but the Orlando Police Officers did not stop the interrogation as they are required to do by the clear mandate of Miranda, the Orlando Police Officers proceeded forward with their interrogation despite Petitioner's initial invocation of his Miranda rights and his subsequent invocations of his Miranda rights during that interrogation. The distinction is that in the instant case, Petitioner asserts and reasserts his requests for an attorney, but these requests are sloughed off by the interrogating officers, whereas in Solem & Edwards, the accused did not keep reasserting his Miranda rights when he was interrogated a second time. There is nothing "voluntary" about Petitioner's actions. Petitioner was incarcerated and requests for an attorney were ignored. For upwards of an hour the Orlando Police Officers questioned the Petitioner after Petitioner had invoked his Miranda rights and extracted incriminating statements from him which were admitted into evidence over Petitioner's timely objection. Such actions by the police are inexcusable and accordingly, this Court should grant certiorari to bring this case in line with the clear mandates of Miranda and its progeny.

This Court has stated that certiorari review should be granted when the federal questions that were raised and ruled upon were dis-

posed of in a manner which conflicts with the decisions of this Court. See Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 9 L.Ed. 2d 837 (1963), Rice v. Sioux City Memorial Park, 349 U.S. 70, 75 S.Ct. 614 99 L.Ed. 897 (1955). When as in the instant case, the Florida Supreme Court decision rests on a serious misapprehension of the federal constitutional law involving Miranda and its progeny, certiorari should be granted.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW FEDERAL QUESTIONS WHICH WERE NOT RAISED DURING TRIAL WHERE THE PROPER RESOLUTION IS BEYOND ANY DOUBT OR WHERE INJUSTICE MIGHT OTHERWISE RESULT.

Respondent in his Brief for Respondent in Opposition stated the trial court was never presented with an opportunity to consider federal claims regarding the issues of the admission of photographs and the admission of evidence of prior acts on misconduct. Counsel for Petitioner objected to the introduction of the inflammatory photographs State v. Wright, 265 So. 2d 361 (Fla 1972) (R. 376, 377, 382-385) which the trial court received into evidence (R. 386).

Counsel for Petitioner also moved to exclude (R. 527) testimony of Mae Guantt (R. 539-544), and objected when she did testify (R. 539, 540) on the basis that her testimony was too remote in time, Barwicks v. State, 82 So. 2d 356 (Fla. 1955), and that it could only be constructed to show bad character or propensity toward violent acts by the Petitioner, Williams v. State, 110 So. 2d 654 (Fla. 1959).

The trial also considered Petitioner's Motion for Judgment of Acquittal and denied it at the close of State's case (R. 1039, 1056) and again at the close of all of the evidence (R. 1200). Therefore, Petitioner's denial is a proper subject for this Court to hear on appeal.

The issues were squarely before the trial court and therefore are now subject to review by this Court. Each side had the opportunity to present their side and the trial court made its decision.

The trial court erred in imposing the death penalty on Petitioner as the aggravating circumstances in the capital sentencing were not weighed in an even hand as required by applicable decisions of this Court. Gamer v. Florida, 430 U.S. 349, 97 S.Ct.

1197, 51 L.Ed. 2d 393 (1977) and Woodson v. North Carolina, 428 U.S. 280 96 S.Ct. 2978 49 L.Ed. 2d 944 (1976). Petitioner raised this issue on appeal to the Florida Supreme Court, but that court failed to follow the guidelines set out by this Court, and now certiorari should be granted because the imposition of the death penalty on Petitioner is unconstitutional.

The remaining issue of the federal questions not brought before the trial court is the issue of King's competence. The record is replete with instances in which the Petitioner evidenced various indications of mental order. The Court noted the Petitioner's "mental condition" (R. 19) and counsel for Petitioner noted his observation of mental deterioration prior to the trial. (R. 26) Dr. Edmund Bartlett, Ph.D. indicated that Petitioner had a mental disorder (R. 1510-1512) and that the Petitioner "was not quite as much in touch as I had initially believed." (R. 1516). This Court should grant certiorari to determine whether the failure to find Petitioner incompetent to stand trial violated the Sixth and Fourteenth Amendments of the United States Constitution.

This Court should grant certiorari to determine the federal questions which were not raised at the trial level, because of the grave injustice which would otherwise result, Hormel v.Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 83 L.Ed. 1037 Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed. 2d 826 (1976). In the instant case his trial could ultimately deprive Petitioner of his life if this Court does not grant certiorari.

III.

THE FLORIDA SUPREME COURT DECISION IS NOT BASED ON ADEQUATE FOUNDATIONS OF STATE LAW.

Respondent in its brief suggests that the decisions made by the Florida Supreme Court rest on adequate foundations of state law, and therefore are not subject to federal review. This would mean that the decision of the Supreme Court of Florida, if left standing, leaves the Petitioner permanently bound by the Florida Supreme Court on matters of federal constitutional law. This Court has the power to correct state judgments to the extent they incorrectly adjudge federal rights. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 97 L.Ed. 469 (1953) Richardson v. Ramirez 418 U.S. 24, 94 S.Ct. 2655

(1974), Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977).

The Florida Supreme Court summarily disposed of six of the issues before the court. The Florida Supreme Court did not specifically base its reasoning for the disposal of these issues on any state grounds. The reasoning for their denial was not stated and this Court cannot assume, as counsel for Respondent would have this court assume, that the Florida Supreme Court's basis for a denial was on adequate state grounds. Therefore, this Court should grant certiorari as the federal constitutional rights of the Petitioner have been violated as shown in Petitioner's Writ of Certiorari filed in this Court.

CONCLUSION

Petition for Certiorari should be granted to determine whether the federal constitutional rights of Richard King have been violated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WARREN H. EDWARDS, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Reply Brief of Petitioner, by depositing the same in the United States mail, first class postage prepaid, as follows:

MARK C. MENSER
Assistant Attorney General
125 North Ridgewood Avenue
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All parties required to be served have been served on this ____ day of March, 1984.

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